No. 407.

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

---

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR ET AL.,
Appellees.

---

# Petition for Rehearing.

---

L. W. ELLIOTT,
AMOS H. CARPENTER,
Solicitors for Appellant.

*In the United States Circuit Court of Appeals, for the Ninth Circuit.*

BERNARD McGORRAY,
Appellant,

vs.

MYLES P. O'CONNOR ET AL.,
Appellees.

## PETITION FOR REHEARING.

The appellant herein respectfully requests that a rehearing may be granted in the above entitled action wherein the decision of the lower Court was affirmed for the following reasons, namely:

1. That it was not error to refuse to allow the complainant to take evidence in support of his bill, as ninety days had elapsed from the time of filing the replication, although the issues were not settled until twelve days before the entry of the decree.

2. That it was not error to consider as evidence upon hearing on bill and answer the denial of the assignment of said judgment made by the defendant O'Connor on information and belief.

3. That it was not error to hold that the title to the

partnership real property of C. W. Carpenter, deceased, did not vest in Clinton H. Carpenter, one of his heirs at law at the time of his death, but in the surviving partner.

The complainant asks for such rehearing on the following grounds, namely:

1. That the issues were not settled within the meaning of Rule 69 until complainant's two motions to strike out portions of the answers, pending on the merits, were finally disposed of. If those motions were granted no evidence was necessary to substantiate the plaintiff's case. Neither party could tell what the issues would be until those motions were passed upon. This was done upon the 31st day of March, 1897, and complainant's time for taking testimony should have been reckoned from that date, but the decree was entered against him twelve days later upon hearing on bill and answer. This was error. If the motions were not made in time, the defendants should have moved to strike them from the files, but by consenting to a continuance and setting them down for hearing on the merits, the objection was waived.

Foster's Federal Practice, Vol. 1, sections 152, 119, 139.

But this ground is not necessarily material in deciding upon the merits of appellant's appeal.

2. The denial by O'Connor of the assignment of the

judgment to complainant was made on information and belief, and for that reason it could not be considered as evidence on such a hearing.

Berry vs. Sawyer, 19 Fed. Rep., 286.
Allen vs. O'Donald, 28 Fed. Rep., 17.

But all the other defendants admit the fact of the assignment, and as the Sheriff was the agent of O'Connor for the purpose of receiving the money and a copy of such assignment (C. C. P., section 705), the admission would bind him. He cannot be heard to dispute, on information and belief, what his agent admits in the line of his duty to be true. If either one of these propositions be true, the allegation of said assignment in the bill should not have been considered as denied.

But the defendants had no right to deny the fact of such assignment. It was no concern of O'Connor's who owned the judgment, provided his lien was recognized and secured.

Bradley vs. Snyder, 58 Am. Dec., 565.
Jones on Mortgages, Vol. II, section 1105.

On pages 8 and 9 of the bill, it is alleged that complainant produced and handed to the Sheriff a copy of "*the assignment of such judgment* to your orator, to-"gether with a copy of the docket of the judgment, " under which your orator claimed the right to redeem, " certified by the clerk of said court, *a copy of said*

"*assignment* from A. H. Carpenter, verified by your "orator's affidavit, showing the amount then actually "due on such judgment lien."

*This was all the statute required him to plead, or prove, in relation to the assignment* (C. C. P., 705), *and the same is not denied by any of the defendants.* It is expressly admitted by the Sheriff in his answer, on page 55 thereof.

The evidence of the assignment was surely sufficient upon hearing on bill and answer.

3. The title to C. W. Carpenter's interest in the partnership realty *vested in Clinton as one of his heirs at law*, and *not in the surviving partner.* This is a primary principle of law, and the doctrine laid down by the Supreme Court of this State in a recent case, where the learned justice said: "It is true that as heirs of their "father, the *title to his* (partnership) *property*, *real* or "personal, *vested* in them, but their *title* did not carry "with it the right of immediate enjoyment."

Robertson vs. Burrell, 110 Cal., 574.
Redfield vs. Wills, Vol. III, page 143.
Wash. on Real Prop., Vol. I, pages 702-4.
Bates on Partnership, sections 293, 712.
Freeman on Executions, Vol. I, section 183.
Parson on Contracts, Vol. I, page 169. Note.

These authorities settle the doctrine in this State, and show conclusively that complainant's judgment was a lien upon Clinton's title.

The cases cited by the defendants, and in the opinion of the Court, do not hold that the title to partnership realty vests in the surviving partner, but that he has an equity in such property for the payment of the partnership debts.

4. If our view of the *last two reasons*, upon which judgment of the lower Court was affirmed, be correct, the appellant, in our opinion, is entitled to a reversal of the decree. but we have the following additional reasons which appear to have escaped the attention of this Honorable Court in considering the case, namely:

I.

Judge McKenna refused to hear the case on bill and answer, because the issues were not settled (Transcript 93). Defendants afterward renewed the motion, without leave of Court, under precisely the same circumstances as existed at the time the first motion was made (Transcript 99, 94).

The first order became the law of the case, and should have been followed.

Reed vs. Allison, 54 Cal., 490.

Cole S M. Co. vs. Va., Etc., Co., 1 Saw., 685.

Waklee vs. Davis, 44 Fed. Rep., 532.

II.

It is alleged in the bill, and undenied in the answers, that only a portion of the estate of Carpenter was devised to Bailey's children; that Clinton was one of the heirs and successors of his late brother, in respect to the land in controversy (Transcript 6), and that said judgment was docketed against him. This alone should entitle the appellant to a decree.

III.

That the Sheriff was an executive officer, and had no interest in the matter of the redemption, and therefore could not contest or litigate, legally or equitably, either as plaintiff or defendant, the claim of complainant.

His answer should have been disregarded.

IV.

The same is true of defendant O'Connor. His interest was the amount of his mortgage note, and having been tendered that sum by a defendant in his action foreclosing the mortgage, he had no right to refuse it. (See Appellant's Brief, pages 14, 15.)

V.

Defendant O'Connor having made Clinton a party to his foreclosure suit, for the purpose of cutting off his right to the property and its redemption, is estopped from denying his and his creditor's right to redeem.

The fact that he was a defendant therein gave him the right to redeem, although he may have had no interest in the property.

Yoakum vs. Bower, 51 Cal., 540.

Lorenzano vs. Camarillo, 45 Cal., 125.

"*Parties to the suit* in which the judgment was "rendered, under which the sale is made," may redeem.

Whitney vs. Higgins, 10 Cal., 554.

VI.

If the Court should hold that the surviving partner, executor or administrator, as the representative of the deceased, was the only person that had the right to redeem the premises, it would be equivalent to holding that the heirs of Carpenter had no rights to their brother's property, which might not be cut off by the fraudulent acts of such representative, because it is alleged in the bill and denied on information and belief (which is not evidence on such a hearing), that such surviving partner, in collusion with the other defendants, was endeavoring to defraud said heirs by getting said

property for himself, and preventing such redemption.

If the heirs were bound by his acts, under such circumstances, it would be practically admitting that courts of equity were unable to afford relief in cases of fraud.

"Every person having an interest in property, subject to a lien, has a right to redeem it from that lien."

Civil Code, section 2903.

A contingent interest is sufficient.

Bacon vs. Bowden, 22 Pick, 401.

VII.

There is an *equitable* as well as a statutory right of redemption.

Whitney vs. Higgins, 10 Cal., 547.

Tuol. Redem. Co. vs. Sedgwick, 15 Cal., 527.

Hall vs. Arnott, 80 Cal., 348.

The appellant pursued the statutory course, and was denied the right. If this Honorable Court refuses a rehearing and affirms the judgment of the lower Court, he will be denied the eqitable right. Where a litigant's claim is equitable and just, as in this case, a court of equity should grant relief, when the granting of the same could work no injury to others. Collusive and fraudulent acts should not be sanctioned at any time, and especially when the perpetrators practically admit that a redemp-

tion by the appellant would not injure them. Their defense is purely a technical one, and ought not to be entertained in this Court. "The right of redemption is a favorite equity."

C. D. & V. Ry. Co. vs. Fosdick, 106 U. S., 47.

Powell on Mortgages, pages 334, 261.

Willard's Eq. Juris., 448.

Yoakum vs. Bower, 51 Cal., 540.

We submit that a rehearing should be granted, that the decree of the lower Court should be reversed, and that a final decree should be directed to be entered in the Court below, which will finally dispose of all matters herein, as by law provided in cases of equity.

Respectfully submitted,

BERNARD McGORRAY,

Appellant.

By L. W. ELLIOTT,

AMOS H. CARPENTER,

Solicitors for Appellant.

I hereby certify that the foregoing petition for rehearing is, in my judgment, well founded in point of law, and that it is not interposed for delay.

AMOS H. CARPENTER,

Counsel for Appellant.